IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC22/2025

BETWEEN [redacted]

Applicant

AND **THE KING**

Respondent

SUBMISSIONS IN SUPPORT OF APPEAL

5 September 2025

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MAY IT PLEASE THE COURT

Contents

Introduction

1. This appeal raises the question of how, if at all, the vexed principle of comity should be considered when undertaking the fact-specific analysis required to determine whether it is unjust or oppressive to resist an extradition surrender under s 8 of the Extradition Act 1999 (the Act). In particular, it focuses on whether comity should be invoked in the context of a 'backed warrant' under Part 4 of the Act, which already provides a more streamlined procedure for the Commonwealth of Australia (the Commonwealth).[1]

2. This appeal also requires consideration of the principles that should apply to cases of lengthy non-fugitive delay where the Commonwealth have been inexcusably dilatory. It squarely confronts the weight to be given to profound changes in personal circumstances during the period of delay, including the best interests of the child and cultural reconnection.

Non-fugitive delay and the birth of a son

3. [redacted] is of Rongowhakaata descent. In February 2015, he returned to his turangawaewae at Manutuke (just outside of Gisborne) after a difficult period with his mental health while working in Perth, Western Australia. He travelled to Australia several times before finally settling in Manutuke in 2020. He started a new life, found full-time employment and formed a new relationship resulting in the planned birth of his first child, a son. [redacted] also reconnected with his iwi and became an integral part of his community.

4. Unbeknownst to [redacted], an extradition arrest warrant was issued by the Commonwealth for his alleged involvement in a violent assault in Perth back in November 2014. Two months before his son was born, [redacted] was arrested in October 2022 and made aware for the first time he was a suspect in the 2014 incident.

5. Judge Cathcart, despite finding the eight year delay was "inexcusably dilatory" of the Commonwealth, determined that [redacted] changed circumstances did not satisfy him that extradition was "unjust" or "oppressive" under s 8 of the Extradition Act (**the Act**).[2] [redacted] appealed to the High Court where Ellis J found the District Court had erred in failing to

[1] The Act also makes provision for any other "designated country": s 39(b).
[2] *Commonwealth of Australia v* [redacted] [2023] NZDC 5941 [District Court judgment].

analyse the significant change in [redacted] personal circumstances – in particular, the interests of his newborn son and whānau – and found the threshold for oppression had been met, quashing the order for surrender.[3]

6. The Commonwealth appealed to the Court of Appeal who, by "the narrowest of margins", allowed the appeal.[4] The Court of Appeal found that Ellis J did not analyse the importance of the principle of comity between New Zealand and Australia, nor did she address the seriousness of the offending. However, mindful of the "extraordinary" delay in this case and the lack of information for the last two years (on account of the appeals process), the Court of Appeal referred the case directly to the Minister of Justice under s 48(1) and (3) of the Act.[5]

7. This Court has granted leave on the question of whether the Court of Appeal was correct to allow the appeal and find that the High Court erred in law when it concluded it would be oppressive to extradite [redacted] to Australia.[6] Put another way, did Court of Appeal err in deciding that the principle of comity and serious nature of the alleged offending outweigh the extraordinary non-fugitive delay and severe impact on [redacted] his young son, whānau and renewed connection with his hapū and iwi under s 8(1)(c) of the Act?

Relevant background

8. The relevant factual and procedural background is outlined in the Court of Appeal judgment at [5]–[9] and [29]–[46].

9. [redacted] is a 34 year old man born in Manutuke, Gisborne. [redacted] is of Rongowhakaata descent. He was in his early 20s when he moved to Australia for work.[7]

The 2014 incident

10. In 2014 [redacted] was living in Perth, Western Australia. He was then aged between 22 and 23 years old.

11. On 8 November 2014, in the early hours of the morning, a violent assault

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[3] [redacted] *v Commonwealth of Australia* [2023] NZHC 1525 [High Court judgment].
[4] *Commonwealth of Australia v* [redacted] [2025] NZCA 8 [Court of Appeal judgment].
[5] The Court of Appeal noted that this direct referral truncated appeal rights: [73].
[redacted] *(SC 22/2025) v Commonwealth of Australia* [2025] NZSC 66.
[7] Affidavit of [redacted] dated 8 December 2022 at [5] [[redacted] **Affidavit**].

occurred outside a restaurant in Western Australia resulting in significant (but not permanent) injuries to the victim, Mr Pittuck.

12. Three months later, on 6 February 2015, the victim identified [redacted] as the person responsible for the attack based on the photo of [redacted] in his Western Australian driver's licence. However, [redacted] was not aware he had been identified by the complainant, he was not approached by Police about this incident, nor were any charges laid against him.

[redacted] *moves between Australia and New Zealand*

13. From late 2014 through to early 2015 [redacted] had been having serious issues with his mental health, including attempting suicide.[8] In late February 2015, following the breakdown of his relationship and in an effort to get well again, [redacted] returned to Gisborne to be closer to whānau support.

14. Just after [redacted] departure, in June 2015, an arrest warrant was issued by the Rockingham Magistrates Court for [redacted]. The charge alleged [redacted] caused grievous bodily harm with intent to do grievous bodily harm.[9] [redacted] was not made aware that a warrant had been issued for his arrest.

15. This is evidenced by the fact that between 2018 and 2019 [redacted] travelled to and from Australia on several occasions, unimpeded.[10] This included a year working and living in Sydney. During that time he took a holiday to Vietnam and travelled in and out of Australia with no issue. At no stage was [redacted] was informed of a warrant for his arrest.

16. It was not until 10 June 2021 that a request for extradition was signed by a magistrate in Western Australia. New Zealand authorities finally received the extradition request from Australia on 25 February 2022, some seven years after [redacted] had first left Australia.

17. Inquiries were made as to [redacted] whereabouts (who was openly living in Manutuke with his family) and the warrant was endorsed by a New Zealand District Court judge on 23 September 2022. [redacted] was arrested in October 2022 and finally informed of the request for extradition. The request took [redacted], and

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[8] [redacted] Affidavit at [7].
[9] Criminal Code 1908 (WA), s 294. In Western Australia this offence carries a maximum penalty of 20 years imprisonment.
[redacted] [redacted] Affidavit at [9]–[10].

his new partner, by surprise, as up until this point he had no idea he was a wanted suspect in Western Australia.

[redacted] *moves permanently back to his whenua, lays down roots and starts a family*

18. Years before arrest, in early 2020, [redacted] moved permanently back to Manutuke – his turangawaewae. In an affidavit filed in the District Court, he described this as a move to getting his life back on track.[11]

19. [redacted] found full-time employment. Since returning to Manutuke in 2020, [redacted] has worked across a number of industries in his community, including scaffolding and forestry work. In addition, [redacted] has focused on his whānau and taking part in team sports and activities (such as hunting and fishing) to support his wairua. He gave up drinking alcohol.[12]

20. [redacted] also became an active member of his community and hapū, having supported his local community by delivering food parcels and firewood to kaumatua during the Covid-19 pandemic. He volunteers at the local marae, including monthly lawn and grounds maintenance work. He is also a major support person, emotionally and financially, for his widowed mother.[13]

21. In July 2021 [redacted] entered into a relationship with [redacted] The couple immediately began planning a future together, including applying for iwi assistance to purchase a house together and start a family. In December 2022, two months after [redacted] was arrested, their son was born. [redacted] has deposed that she relies on [redacted] for emotional, physical and financial support.[14] She has also stated that if they had known that [redacted] was going to be extradited, they would not have planned to have a baby.[15]

22. The reason for the eight year delay was said in the request to be administrative issues in the criminal justice visas process for extraditions from New Zealand to Australia and workload pressures of the prosecutor.[16] Further delays were

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[11] [redacted] Affidavit at [21].
[12] [redacted] Affidavit at [28].
[13] [redacted] in support of notice of opposition to application seeking extradition of [redacted] dated 2022 [redacted] **t**] at [21]–[22].
[14] Affidavit of [redacted] support of notice of opposition to application seeking extradition dated 2022 [[redacted] **Affidavit**] at [12] and [14]–[16].
[15] [redacted] Affidavit at [10].
[16] Affidavit of Roy Michael Morrish in Support of an Application to Extradite dated 3 June 2021 at [11].

caused by the Covid-19 pandemic due to the New Zealand borders closing between March 2020 and April 2022.

23. This factual background is not disputed. In short, all parties accept that:

a. [redacted] did not know he was a suspect in the 2014 incident and has not sought to evade Australian authorities.

b. There was a delay of just under eight years between the incident and [redacted] being charged.

c. In that eight years [redacted] has moved back to his mana whenua, reconnected with his hapū, become an integral member of his community and, most importantly, has become a father for whom he is the primary financial provider.

Decisions of the lower courts

The District Court decision

24. Judge Cathcart began his judgment in the District Court by recounting the relevant factual and legal background. His Honour noted that (by that stage) over eight years had passed since the offence that was allegedly committed, which he said was "[b]y any measure … a significant period" that "calls for explanation."[17]

25. His Honour set out the chronology of events. A delay between 25 June 2015 and 12 June 2016, while approval to extradite was sought from the Western Australian Police Force, could not be explained.[18] There was "some explanation" for delay between 13 June 2016 and 24 February 2020, which Judge Cathcart described as an "amalgam of excuses" relating to "the interaction between Criminal Justice Visas and the extradition process" and "workload pressures of the prosecutor".[19] There was then delay caused by the Covid-19 pandemic.[20] Judge Cathcart did not accept that the delay had been adequately answered, and concluded that it was "inexcusably dilatory", a finding he considered was relevant to whether surrender would be

[17] *Commonwealth of Australia v* [redacted] [2023] NZDC 5941 at [31].
[18] At [33].
[19] At [34].
[20] At [35].

oppressive.[21]

26. Judge Cathcart noted that the onus was on [redacted] to establish a s 8(1)(c) restriction on the eligibility for surrender. He rejected the inference that [redacted] abrupt departure from Australia in February 2015 was related to [redacted]'s alleged offending. He made an express finding that [redacted] "did not know he was a wanted suspect when he first left Australia".[22] The Judge explained further travel made by [redacted] to Australia; [redacted] was not stopped during trips to Australia except to be questioned about fines.[23]

27. His Honour explained that, "[s]ignificantly", [redacted] had been in a relationship for almost two years, with a child, and that [redacted] had reconnected with whānau.[24] He noted that [redacted] was reliant on [redacted] income and that the couple would not have had a baby had they known about the request to extradite.

28. Considering whether extradition would be unjust, first, Judge Cathcart found that the "significant delay" would make [redacted] "capacity to mount an effective defence difficult", but a fair trial would not be impossible or unlikely, and a stay of prosecution could be granted if necessary.[25] His Honour noted this was particularly so given procedural safeguards arose with a backed warrant "within which is embedded the principle of comity".[26]

29. Turning to whether the extradition would be oppressive, Judge Cathcart noted that "the threshold for oppression is a high one" and "must be linked with the prospect of extradition".[27] Inaction by the prosecution was considered relevant, as was the entire period of delay.[28] But Judge Cathcart called for a "cautious approach", referring to the importance of "comity" and mentioning (again) the possibility of a stay.[29] While there were some comparisons with *Curtis v Commonwealth of Australia*[30] and the present case that favoured [redacted], [redacted] was not as young as Mr Curtis when the offending had occurred (Mr

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[21] At [36]. This finding has never been chellenged by the Commonwealth.
[22] At [38].
[23] At [42].
[24] At [45].
[25] At [52], relying on *Commonwealth of Australia v Mercer* [2016] NZCA 503, at [53] and *Gomes v Government of the Republic of Trinidad & Tobago* [2009] 1 WLR 1038 (HL) at [27].
[26] At [52].
[27] At [54].
[28] At [54]–[55].
[29] At [56] (see also [52]).
[30] *Curtis v Commonwealth of Australia* [2018] NZCA 603.

Curtis had gone from being a child to an adult since leaving Australia); thus, "[t]he youth-driven analysis employed in *Curtis* has no relevance here."[31] Judge Cathcart found that "extradition here will bring real hardship": "removing [redacted] from his cultural connections" was noted, and there would be "real hardship to [redacted] and his whanau".[32] But the standard of oppression was not met. The Judge then considered a referral to the Minister of Justice under s 48, and found no basis for such a referral.[33] A surrender order was issued.

The High Court decision

30. Justice Ellis in the High Court allowed [redacted] appeal, providing a reasons judgment later that same week.[34] She noted that [redacted] "is a valued member of a close whanau" and "is embedded in the life of his whanau and the wider community."[35] The question was whether the District Court was right that he must be extradited,[36] and more specifically, whether because of the amount of time that has passed and having regard to all circumstances, it would be unjust or oppressive to surrender him.[37] Her Honour noted the onus was on [redacted] to establish the restriction on surrender under s 8 of the Extradition Act on the balance of probabilities.[38]

31. The High Court found error in the analysis of whether surrender would be oppressive.[39] The delay was inexcusably dilatory.[40] Justice Ellis noted that the *Curtis* case was used as a benchmark and basis for comparison, but suggested that this did not allow for a rigorous individualised assessment, making it "too easy to miss or minimise important matters that are unique to [redacted] case."[41]

32. Justice Ellis cited authority for the proposition that the position of children is relevant in an extradition context and that Art 3 of the United Nations Convention on the Rights of the Child, requiring that children's best interests

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[31] At [59].
[32] At [60].
[33] At [68].
[34] [2023] NZHC 1587; the results judgment is [2023] NZHC 1525.
[35] At [2].
[36] At [3].
[37] At [5].
[38] See n 6.
[39] At [29].
[40] At [30].
[41] At [31].

be a primary consideration in all actions concerning children, may be engaged.[42] In her view, the District Court judge had implicitly acknowledged the significance of [redacted] newborn son, but only as part of a narrative of evidence, with no focus on the interests of the child and family when oppressiveness was analysed.[43] It was "indisputable that [redacted] surrender would not be in the best interests of his infant son", said Ellis J.[44] There was also the necessary hook between that fact and the delay: the decision to have a child would not have been made but for the delay.[45] The delay resulted in [redacted] partner and their child being financially dependent on him.[46]

33. Justice Ellis concluded she did not "entirely … agree" with the proposition that a youth-driven analysis had no relevance in this case.[47] [redacted] unlike *Curtis*, would not have been tried as a youth had he been arrested in 2014 or 2015, but he would have been a young person (at 23) as understood by New Zealand courts, and the development of [redacted] would be materially disrupted by extradition.[48] The Judge decided not to make a reference to the Minister in light of her clear view on oppression.[49]

34. The Commonwealth applied for leave to appeal against this decision on 18 July 2023. The matter was not heard by the Court of Appeal until November 2024.[50]

The Court of Appeal decision

35. The Court of Appeal clearly placed great weight on comity as a factor in the s 8 exercise. The Court said: "The principle of comity weighs heavily in favour of allowing the appeal", defining comity "broadly as the respect of one state for another".[51]

36. The Court said there were two aspects of comity relevant to this context. First, there should be trust and confidence that the Australian system would treat

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[42] At [33].
[43] At [35].
[44] At [36].
[45] At [37].
[46] At [38]..
[47] At [39].
[48] At [42].
[49] At [45].
[50] This delay in hearing the appeal was due to leave being determined separately and then issues in assembling the case on appeal.
[51] *Commonwealth of Australia v* [redacted] [2025] NZCA 8 [**CA judgment**] at [53].

[redacted] as he would be treated here, including "the appropriateness of allowing Australia's courts to assess the impact of delays … and what, if any, remedy should be granted."[52] Second, there was a particularly close and trusting relationship between Australia and New Zealand, reflected in the backed warrant procedure set out in pt 4 of the Extradition Act.[53]

37. The Court of Appeal recognised New Zealand's ratification of UNCROC made it "axiomatic" the best interests of the child should be "relevant" in extradition decisions. However, the Court relied on the comments of Lady Hale in United Kingdom Supreme Court case of *HH v Deputy Prosecutor of the Italian Republic, Genoa* (***HH***)[54] as support for the countervailing factors of public interest in extradition and seriousness of the offending reducing the weight a court might attach to family disruption and best interests of the child.

38. The Court of Appeal noted that in *Tukaki v Commonwealth of Australia*[55] removal of a person from their culture and cultural practices was recognised as a relevant factor. However, the Court also observed that where the consequences are no more than the inevitable consequences of extradition then allowing them to meet the threshold of oppression would be to create "safe havens" as referred to by Lady Hale in the *HH* case.

39. Justice Collins then returned to comity when finding that Ellis J "did not … analyse the importance of the principle of comity when making a determination under s 8(1)(c) of the Act".[56] The Court held that "[b]y the narrowest of margins, we are satisfied that the principle of comity and the seriousness of [redacted] alleged offending outweigh" the countervailing considerations.[57]

SUBSTANTIVE SUBMISSIONS

40. The appellant argues the Court of Appeal erred in three overlapping ways; first of all, by superimposing the principle of comity on the section 8 test and, in doing so, tipping "a very finely balanced" case towards surrender; secondly,

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[52] Ibid, at [54].
[53] Ibid, at [55].
[54] *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 at [5]–[8] per Lady Hale.
[55] *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597.
[56] Ibid, at [64]. The Court of Appeal says that Ellis J did not address the seriousness of offending as well.
[57] Ibid, at [65].

by relying on observations in international cases dealing with fugitive delay to buttress the conclusion that the public interest favoured surrender; and, third, by failing to analyse the profoundly changed personal circumstances of the appellant which entailed primary consideration of best interests of the child in this case and cultural reconnection.

The double-counting of comity

41. The Court of Appeal's approach effectively double-counted comity as a factor to be weighed against strong countervailing considerations. The Court's error highlights the need to carefully consider the place (if any) of comity in the s 8 exercise.

42. The backed warrant process already gives statutory effect to comity through the balance it strikes between extradition imperatives and proper restrictions on surrender. It is therefore not appropriate for a court to further apply comity as a factor (or 'trump card') for the purposes of s 8(1)(c).

The legislative history – comity was built into the endorsed warrant regime

43. The Extradition Act 1999 was premised on principles of comity and international cooperation between states. It sought to modernise New Zealand extradition law by allowing extradition for a wider range of offences and streamlining processes with designated countries.[58]

44. As the explanatory note to the Extradition Bill explains, the Act sought to strike a balance between considerations of comity and cooperation and an individual's fundamental human rights (including their liberty interest); particularly if the requesting state was not the person's usual state of residence:[59]

> While the Bill aims to ensure that alleged offenders can be surrendered expeditiously, it also sets a "bottom line" as to the circumstances in which extradition may occur. This helps to protect the alleged offender's basic human rights, given that the person is threatened with removal from the safety of a state where he or she has committed no offence.

[58] Extradition Bill 1998 (146-1) at iii.

[59] Extradition Bill 1998 (146-1) at iii. See also ii: "Extradition law … attempts to strike an appropriate balance between the aspirations of the international community … and the legitimate expectations of persons accused or convicted of crimes that they will be dealt with humanely and in accordance with law."

45. Section 8 of the Act is therefore an important statutory check[60] intended to ensure protection for the rights of alleged offender and places a limit on the otherwise acknowledged position of comity between states. It provides:

> **Discretionary restrictions on surrender**
>
> (1) A discretionary restriction on surrender exists if, because of—
>
> (a) the trivial nature of the case; or
>
> (b) if the person is accused of an offence, the fact that the accusation against the person was not made in good faith in the interests of justice; or
>
> (c) the amount of time that has passed since the offence is alleged to have been committed or was committed,— and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.
>
> (2) A discretionary restriction on surrender exists if the person has been accused of an offence within the jurisdiction of New Zealand (other than an offence for which his or her surrender is sought), and the proceedings against the person have not been disposed of.

46. Section 8 sits within Part 1 of the Act, which sets out general provisions of the Act and provides for a check on the various discretionary powers of surrender in the Act. One such discretionary power is what is known as the "endorsed warrant" or "backed warrant" regime in Part 4 of the Act. This procedure is essentially a fast-tracked method for extradition to Australia or other designated countries.[61]

47. Under the backed warrant regime a person is eligible for surrender if an endorsed warrant for their arrest has been produced to the court and the court is satisfied the person is an extraditable person and the offence is an extraditable offence.[62] The regime sits outside of what was termed the "main regime" and therefore differs from the primary regime "both in terms of the standard of evidence required and the roles of the court and the minister".[63] This process of endorsed warrants reflects the high degree of comity between

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[60] Ibid, at v of the Explanatory Note: "One consequence of relaxing extradition procedures ... is that there is a correspondingly greater need for appropriate statutory checks and balances to be in place to ensure that an alleged offender has adequate protections."
[61] Extradition Act, s 39.
[62] Extradition Act, s 45(2).
[63] Extradition Bill 1998 (146-1) at iv.

New Zealand and Australia.[64] That is woven into the fabric of the regime.[65]

48. As Rynae Butler explains, this is because the backed-warrant procedure accounts for a significant proportion of all extradition requests and therefore must necessarily rely on the concept of comity.[66] But, importantly, Butler points out that the word "comity" does not appear in the Act or its predecessor bills. Similarly, the Law Commission's report recommending reform of the Extradition Act makes little mention of comity. And where comity is mentioned, it is treated with caution. An earlier proposal by the Law Commission to remove some or all of the grounds for refusing surrender due to comity was rejected.[67]

49. In its proper context, the role and purpose of s 8 is clear: it is a crucial check and balance on expedited extradition procedures which already give significant deference to comity and cooperation between neighbouring states.[68] As this Court has recognised, comity is subsumed into the "backed warrant" process which was "intended to tilt the balance towards efficiency in extradition recognising the particular interests in comity with Australia".[69]

50. However, it follows from this that, because the backed warrant regime already makes provision for comity considerations, there is no place for "comity" to be further acknowledged or weighed by the Court in applying the s 8 test. To do so would be to apply an unjustifiable gloss on the statutory language and risks subverting the very purpose of s 8 – to act as a check on the otherwise streamlined extradition process under the backed warrant regime. A legislative balance has been struck between comity and liberty interests. To count 'comity' again in application of the legislation would be to distort that carefully struck balance.

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[64] See further *Mailley v District Court at North Shore* [2013] NZCA 266 at [7]–[8] where the Court of Appeal explained that the endorsed warrant procedure "is less formal and more streamlined" and "reflects the high degree of comity between New Zealand and Australia".
[65] As acknowledged by the learned authors of *Extradition Law in New Zealand* at [5.1.2]: "the process thus rests on an assumption of a high degree of comity as a result of geographical and cultural affinity".
[66] Rynae Butler, 'Imbalance in extradition: The backing of warrants with procedure part 4 of the Extradition Act 1999' [2017] NZCrimLawRw 5, as referred to in the minority decision of Ellen France J in *R Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480 at [82].
[67] See Part V(A) of the article.
[68] Extradition Bill 1998 (146-1) at v.
[69] *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480, at [91] per Ellen France and McGrath JJ dissenting.

New Zealand case law on the backed warrant regime

51. Contrary to the approach of the Court of Appeal, the New Zealand authorities do not suggest that additional comity interests should be incorporated into the s 8 assessment when an extradition request has been made by Australia.

52. The Court of Appeal relied upon on a description of the backed warrant procedure by this Court in *Radhi v District Court at Manukau*.[70] *Radhi* was an appeal from a judicial review of the District Court decision allowing Mr Radhi to be extradited to Australia. The *Radhi* case did not involve restrictions on surrender. Rather, it was agreed by counsel before the Supreme Court in *Radhi* that s 48(4)(a)(ii) involved a drafting mistake.

53. Thus, the discussion in *Radhi* of the principle of comity was in the context of a judicial review of a decision made under s 48 of the Act rather than the application of ss 8 and 45 of the Act. Its application is therefore limited.

54. A similar point was made in the judgment of Winkelmann J (as she then was) in *Tukaki;* also an appeal from a judicial review of a decision of the District Court.[71] Winkelmann J endorsed the statement from *Radhi* that extradition involves "an element of international reciprocity of considerable public interest".[72] However, critically, her Honour held that: [73]

> Notwithstanding the strong public interest in extradition, the Extradition Act expressly contemplates that there will be a careful consideration of the circumstances of the case to determine whether a mandatory or discretionary restriction applies.

55. Further, her Honour accepted that that New Zealand's international obligations (implicitly referring here to human rights obligations) and the Treaty of Waitangi are relevant to statutory interpretation in this context.[74] She also agreed with counsel for the appellant "that the importance of those reciprocal obligations [in extradition] does not displace the necessary inquiry under ss 8 and 48, but it is a factor to be weighed when determining what constitutes extraordinary or compelling circumstances".[75]

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[70] *Radhi v District Court at Manukau* [2017] NZSC 198, [2018] 1 NZLR 480; at [23] of the Court of Appeal's judgment.
[71] *Tukaki v R* [2018] NZCA 324, [2018] NZAR 1597.
[72] Ibid, at [32]; citing *Radhi* at [34].
[73] Ibid, at [33].
[74] Ibid, at [34]–[35].
[75] Ibid, at [45].

56. In other words, the backdrop of international relations should not distract from the requirement to undertake a fact-specific evaluation of the particular case under s 8 of the Act, including consideration of international obligations and the Treaty of Waitangi.

57. Winkelmann J also observed that "[t]he public interest in extradition explains the threshold set in ss 7, 8 and 48".[76] As Winkelmann J rightly pointed out, the public interest is already factored in to how the legislative standard is set. So too, the appellant argues, are considerations of comity. As Winkelmann J warned in relation to the public interest, there is a real risk of double-counting if these factors are then given further weight when undertaking the evaluative assessment required by s 8.

58. In sum, *Tukaki* does not support the proposition that there is a need for any, or any particular, weight to be given to comity in cases concerning the backed warrant regime. Rather, her Honour emphasised that the public interest in extradition and/or considerations of comity do not displace the fact-specific inquiry, nor do they displace other relevant legal principles and obligations, including the Treaty of Waitangi (as we will return to).

59. The Court of Appeal also relied upon *McGrath v Minister of Justice* in emphasising the high degree of comity between Australia and New Zealand's criminal justice systems.[77] This case did not consider the role of s 8 as a restriction on surrender. Rather, it concerned various challenges to the Minister's decision on referral under a backed warrant regime, including on the basis of claims of bias, material errors of fact and unreasonableness.[78] It takes the question before this court no further.

The amorphous, uncertain character of comity

60. Even if comity were to have relevance in the s 8 exercise, there is real risk to both individual rights and certainty in placing any or any significant (and determinative) weight on it.

61. A prominent article by Schultz and Ridi (albeit on comity primarily in the international context) notes that "[m]ost legal systems look at the word

[76] Ibid, at [31].
[77] CA judgment at [54] referring to *McGrath v Minister of Justice* [2014] NZHC 3279, [2015] NZAR 122.
[78] At [8].

[comity] with some suspicion because there seems to be no end to the debate on its meaning"; the learned authors state that to "talk of a principle of 'comity'" in international law "is to talk of a principle that does not satisfy the legality threshold".[79]

62. A further recent article by Kevin W. Gray is critical of the use of "comity" by the Canadian Supreme Court, including in extradition cases.[80] The problem with comity arises, Gray argues, when courts use it to be too deferential to governmental interests in light of competing rights and obligations.[81] This leads to confusion and uncertainty.

63. An earlier version of the Gray article begins with the Dicey quotation: "[c]omity is used to cover a view which … affords a singular specimen of confusion of thought produced by laxity of language".[82] Gray argues that comity has "produced a conceptual muddle" that has served to duck difficult questions of rights violations.[83]

64. Gray gives one definition of comity in the public law context as the principle that states should refrain from questioning the lawfulness of another sovereign state's acts, and restrict issuing judgments when to do so would amount to an unjustifiable interference with the lawfulness of another state's acts.[84]

65. In the New Zealand context, Rynae Butler proposes that whilst "comity" has often been referred to in case law, its meaning is not clear.[85] Butler argues that "without a precise definition of comity being agreed upon, it is difficult to know how the judiciary or executive conceptualises or weighs comity when considering grounds for refusing surrender".[86] Somewhat perversely, Butler evidences (by reference to cases) that Australia has often been cautious in placing significant weight on comity when acceding to extradition requests to

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[79] Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals' (2017) 50(3) Cornell International Law Journal 577 at 577. The second remark cites James Crawford's work on public international law in support of the proposition (see fn 7).
[80] Kevin W Gray, 'That Most Canadian of Virtues: Comity in Section 7 Jurisprudence' (2020) 10(1) Western Journal of Legal Studies 1.
[81] At 28.
[82] See online SSRN version at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333599 (last accessed 7 August 2025); the quotation is from Lawrence Antony Collins, Albert Venn Dicey and John Humphrey Carlile Morris, *Dicey and Morris on the Conflict of Laws* (13th ed, Sweet and Maxwell, London, 2000) at 534.
[83] See above n 80, at 2.
[84] Citing Schultz and Roddi, above n 79, at 578–579.
[85] See above n 66.
[86] At 67.

New Zealand. Under s 34(2) of the Extradition Act 1988, which governs extradition of people from Australia to New Zealand, an "unjust" and "oppressive" standard also applies; indeed, the standard is to some extent broader.[87] Butler suggests that Australian courts on occasion have been more willing to doubt fair trial protections in New Zealand, compared to New Zealand courts' approaches to Australian fair trial protections (notwithstanding the absence of a Bill of Rights in Australia).

66. Four primary points emerge from the relevant secondary authorities:

a. First, there is some doubt that comity represents a legal principle, rather than an extra-legal consideration relevant to diplomacy and political practice.

b. Second, if comity does have legal status, it is reducible to a doctrine of deference to another state; the New Zealand courts in extradition cases should be slow to graft onto the Extradition Act a further doctrine of deference when a careful legislative balance has been struck between the differing legislative purposes relevant to extradition (including cross-border cooperation and liberty of the subject).

c. Third, there is difficulty in determining the meaning of comity, and its metes and bounds; particularly where it is not referred to explicitly in a statute. This can result in real uncertainty in applying it in a domestic context. Courts must therefore be careful in placing importance on it.

d. Fourth, it would be odd to over-emphasise comity with Australia when Australian courts do not mirror such a focus on comity.

Comity led the Court of Appeal into error

67. The appellant argues the Court of Appeal erred in recognising comity as a freestanding principle that should tip the balance in consideration of whether a discretionary restriction on surrender applies under s 8(1)(c) of the Act. Comity should not be used to read down the words of s 8(1)(c). Put differently, if comity were applied as endorsed by the Court of Appeal, it would place a thumb on the scales of every extradition request. Such an

[87] See s 34(2): "or for any other reason, it would be unjust, oppressive or too severe a punishment to surrender the person to New Zealand ...". See https://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/cth/consol_act/ea1988149.txt.

outcome is unprincipled and contrary to the clear statutory scheme.

68. Both aspects of comity identified by the Court of Appeal are already reflected in the streamlined statutory scheme, which gives rise to a need to give proper effect to s 8 as a check and balance on a more relaxed procedure. The effect of the Court of Appeal's analysis would be to 'double-count' comity by applying the special backed warrant procedure and then further adding to the s 8(1)(c) analysis comity considerations. The Court of Appeal has conflated the underlying rationale of extradition treaties or arrangements, and the considerations to be taken into account when determining whether a restriction on extradition applies under New Zealand law. It also sits in tension with the specific direction of the statute ("having regard to all the circumstances of the case": s 8(1)) to undertake a fact-specific assessment when determining whether a discretionary restriction on surrender exists.

69. Further, comity – if it is relevant – should entail respect by Australian authorities for the enforcement of New Zealand legislation. New Zealand has legislated for discretionary restrictions on surrender. That legislative instruction should not be read down because of a free-floating concept of comity that (a) does not appear in the statute, (b) is ill-defined, and (c) if applied at all, should be subject to the text of the Act. Upholding comity is not the Act's only purpose; it plainly seeks to uphold both extradition arrangements and the liberty of the subject, which is why restrictions on surrender are set out in the Act.

70. Finally, the Courts have found in other contexts that comity places obligations on both "actors".[88] New Zealand fulfils its comity obligations through the backed warrant process. Australia has an obligation to act promptly and respect New Zealand's domestic obligations to its citizens. If Australia is inexcusably dilatory, then it should not be able to rely on comity to overcome the consequences of its delay, if a court determines that such delay – in combination with other matters – renders extradition oppressive.

The significance of non-fugitive delay

71. When principles of delayed request extradition cases are properly applied to this case, the fact of the extraordinary non-fugitive delay, which led to

[88] *Skerret-White & Ors v Minister for Child* [2024] NZCA 160 at [115].

profoundly changed family circumstances, tip the balance towards refusing surrender.

The Court of Appeal erred in applying cases concerning fugitive delay

72. Lady Hale's comments in the case of *HH*, as relied upon by the Court of Appeal, do not support the paramountcy of comity and the public interest in extradition, especially in the context of the inquiry required by s 8(1)(c). The appellant argues the Court of Appeal misapplied the observations in *HH* to the s 8(1)(c) Act assessment.

73. Importantly, the United Kingdom Supreme Court in *HH* was concerned with two *fugitive cases* which *did not* qualify for the "[p]assage of time" bar on extradition under s 14 of the UK Extradition Act 2003 that provides:[89]

> A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—
>
> (a) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it).

74. The Court in *HH* was concerned with the residual test under s 21 of the UK Extradition Act 2003 which requires a judge to decide "whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998". The Court was accordingly required to consider a proportionality assessment of interference with article 8 (right to private and family life). As Lady Hale acknowledged, while the passage of time could not be relied on under s 14 of the UK Act, the overall delay remained "relevant" to the article 8 assessment.[90]

75. The Court of Appeal's reliance on *HH* is misplaced to the extent it supports the exercise required under s 8(1)(c) of the Act. The courts should be cautious to place any significant reliance on the balancing test mandated by the European Convention to the analysis required by s 8(1)(c) of the Act, where a different legislative standard is prescribed.

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[89] A category 1 territory is one designated under the UK Act and cannot include a territory where the death penalty would follow conviction: s 1 of the UK Extradition Act 2003.
[90] *HH v Deputy Prosecutor of the Italian Republic, Genoa,* above n 54, at [46].

Non-fugitive delay cases

76. Properly applied, United Kingdom cases demonstrate that in determining whether the threshold of unjust or oppression has been reached, the impact of non-fugitive delay, combined with changed personal circumstances, is actually significant. Delay cases involving non-fugitives should be treated differently from cases involving fugitives.

77. *Kociukow v District Court of Bialystok* concerned an appeal from a Magistrates Court ruling that Mr Kociukow should be extradited to Poland.[91] A European arrest warrant had been issued in July 2005 and certified in December 2005 in relation to offences of attempted robbery and robbery alleged to have been committed (including with the use of a knife) on 18 August 1999. The offences could lead to a term of 15 years' imprisonment.

78. The High Court judges[92] recounted s 14 of the Extradition Act 2003 (UK), which imposes a bar on extradition by reason of passage of time if it "would be unjust or oppressive" to extradite in the circumstances. The High Court emphasised that the appellant had no knowledge of the robbery in question, which occurred over six years earlier. Justice Jack (with whom Lady Justice Hallett agreed) concluded "that there is a very real risk that the appellant will be prejudiced in his defence by the passage of time": there were possible difficulties in dealing with evidence first heard six years later, and if the case turned on identification evidence there was a greater risk of a wrong conviction.[93] There were also "no instructions [provided to the prosecution] as to why the warrant had not been issued until late last year [in 2005]".[94] The High Court held that the lower court erred in rejecting the relevance of the passage of time. The extradition order was thus quashed.

79. A similar point was made in *Loncar v County Court in Vukovar (Croatia).*[95] This was also an appeal against an extradition order in the Magistrates Court.[96] Mr Loncar was sought – via a warrant issued in July 2014 – to serve a sentence of four years, imposed on 5 October 2001, for offending amounting to attempted murder. The original alleged offending had occurred in 1994.

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[91] *Kociukow v District Court of Bialystok* [2006] EWHC 56 (Admin).
[92] Lady Justice Hallett and Justice Jack sitting jointly.
[93] Ibid, at [10].
[94] Ibid, at [11].
[95] [2015] EWHC 548 (Admin).
[96] [2015] EWHC 548 (Admin).

Mr Loncar was initially acquitted. A retrial had occurred in 2001 in Mr Loncar's absence and without his knowledge; by that time Mr Loncar had moved to England. A sentence of four years was imposed.

80. In 2005, extradition of Mr Loncar was requested. In 2006 a District Judge in the Magistrates Court found that it would be unjust or oppressive to extradite Mr Loncar by reason of the passage of time.[97] Then, in 2014, when at Luton airport Mr Loncar was arrested pursuant to a further arrest warrant issued in 2014. Extradition had been ordered by the Magistrates Court.

81. The High Court first considered whether extradition was barred by reason of passage of time. Some eight settled principles on extradition and delay under s 14 were helpfully set out.[98] It was made clear that delay is relevant in different ways where a person is a fugitive as opposed to a non-fugitive. Apart from "in the most exceptional circumstances" delay cannot be relied upon where it is the result of a fugitive fleeing the country, concealing whereabouts, or evading arrest.[99] It was said that the gravity of the offence is relevant to whether changes in circumstances render extradition oppressive.[100] Relatively commonplace hardship is unlikely to be sufficient to meet the test of "oppression".[101] The length of time is an important consideration in determining whether return would be oppressive.[102] As is well-canvassed in the authorities, a related relevant factor is whether "the delay has engendered in the requested person a legitimate sense of security from prosecution or punishment."[103] Culpability of delay by foreign authorities may contribute to oppressiveness, and "may be decisive in what is otherwise a marginal case."[104]

82. Despite the seriousness of the alleged offending the Court found it would be oppressive to extradite Mr Loncar by reason of the passage of time.[105] It was 20 years since the alleged offending. Mr Loncar was not responsible for the

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[97] Ibid, at [15].
[98] Ibid, at [29].
[99] Ibid, at [29](2).
[100] Ibid, at [29](5).
[101] Ibid, at [29] (4).
[102] Ibid, at [29](6). See also *Wenting v High Court of Valenciennes* [2009] EWHC 3528 (Admin).
[103] Ibid, at [29](7), citing *Gomes v The Government of Trinidad and Tobago* ("***Gomes***"), above n 25, and *La Torre* v *The Republic of Italy* [2007] EWHC 1370 ("***La Torre***").
[104] Ibid, at [29](8), citing *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 (HL), *Gomes* and *La Torre* in support. New Zealand authorities have been mixed as to whether culpability is *only* relevant in a marginal case: compare *Mercer*, above n 25, at [53] with *Curtis*, above n 30, at [52], [104]-[119] where the Court of Appeal distinguished *Mercer* and found "institutional delay" highly relevant.
[105] Ibid.

delay and was not a fugitive from justice. There was "no adequate explanation" for long periods of the delay.[106] Mr Loncar had been lulled into a legitimate sense of security.[107] The passage of time would prejudice the retrial, including because of the availability of witnesses, and the accuracy of recollection. Importantly, Mr Loncar had established a family life, with now grown-up sons, and two grandchildren.[108] Mr Loncar was also considered a suicide risk and extradition would create mental health risks.[109]

83. The distinction between non-fugitive versus fugitive delay was also emphasised in *Geleziunas v Prosecutor General's Office, Republic of Lithuania*.[110] The offence was one of swindling property of a high value, which carried a maximum sentence of eight years' imprisonment.[111] It was underscored by the High Court judge that the appellant was not a fugitive.[112] He came to the United Kingdom in February 2010, soon after the alleged offending. An initial search for him was conducted in 2012 following a warrant being issued in Lithuania, but no further action was taken. Then in 2014 the case was revived, and the appellant was arrested in June 2014. The District Judge[113] found that the offence was serious, that the lapse of time was not great, that the appellant did leave Lithuania soon after the offending, and that there would be clear family impacts (on his wife and children) in the event of extradition.[114] The Judge found that extradition would not be oppressive or unjust, and that the impact on private and family life rights was not disproportionate.[115]

84. The High Court used as a starting point the fact that the appellant was "not a fugitive" and had "lived openly and on the record in this country since his arrival in February 2010".[116] The judge inferred that "there was as significant element of culpable delay",[117] of at least three years in total[118] out of the

[106] Ibid, at [30](3).
[107] Ibid, at [30](4).
[108] Ibid, at [30](6).
[109] Ibid, at [30](7).
[110] [2016] EWHC 16 (Admin).
[111] Ibid, at [1].
[112] Ibid, at [3].
[113] In the UK such judges are not referred to as District Court judges, but simply as District Judges.
[114] Ibid, at [5].
[115] Ibid, at [6]–[7].
[116] Ibid, at [35].
[117] Ibid.
[118] Ibid.

overall (approximately) five years.

85. Moreover, the judge said: "during the course of that delay the Appellant and his wife, along with their children, have put down roots in this country" (including through their sixth child being born) in the country.[119] The "effect of extradition on the family will be significantly greater now than it would have been had there not been culpable delay."[120]

86. The judge found that the alleged offence was "not of the utmost seriousness"; as well, there was "no information to suggest that the Appellant is other than of previous good character" and he had not committed any offences in the period since February 2010.[121] The offence would not necessarily lead to a custodial sentence. The judge repeated that the period that had passed was one "in which there has been deeper entrenchment of the Appellant's family life in this country."[122] Accordingly, the judge found that it would be oppressive for the appellant to be extradited.

87. A similar approach was taken in *Kazaniecki v Regional Court in Torun, Poland*, where on the appeal the Court held that the District Court judge should not have relied upon cases concerning fugitive delay.[123] The Court explained that "the additional public interest in discouraging fugitives to treat the UK as a safe haven does not arise" in non-fugitive cases.[124] Rather, the focus should be on the explanation for the delay and the impacts of that delay. The High Court judge found the delay of eight years was "a significant delay … which, in the absence of any explanation to the contrary, appeared extremely dilatory."[125]

Principles to be applied in non-fugitive delay cases – and application to this case

88. In summary, the following principles apply in cases of non-fugitive delay:

    a. Delay in non-fugitive cases is significantly different to cases where a requested person has effectively brought about the delay in fleeing and evading arrest;

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[119] Ibid.
[120] Ibid.
[121] Ibid, at [36].
[122] Ibid, at [37].
[123] [2016] EWHC 3210 (Admin) at [34].
[124] Ibid.
[125] Ibid.

b. The gravity of the offence is relevant to whether changes in circumstances render extradition oppressive;

c. Relatively commonplace hardship is unlikely to be sufficient to meet the test;

d. The length of delay will be of particular importance when assessing whether the impact of extradition would now be oppressive;

e. A relevant factor will be whether the delay has engendered a sense of security in the requested person from prosecution and punishment;

f. The extent to which a requested person has laid down family roots and become "deeply entrenched" in their home state will be of particular relevance;

g. The additional public interest in ensuring that countries are not made "safe havens" does not arise in non-fugitive cases; and

h. Culpable delay by the requesting country is relevant to an overall assessment, and may well be decisive in what is otherwise a marginal case.

89. The Court of Appeal was wrong to rely on the risk of a safe haven being created – as an argument pointing away from surrender – when [redacted] was not a fugitive.[126] It did not appear to draw a distinction between fugitive and non-fugitive cases,[127] or to give weight to the false sense of security engendered in [redacted] or to engage with the fact the delay was solely attributed to the Commonwealth. In a case where the Court – by its own admission – decided the case by the narrowest of margins, these failings led the Court into error.

The proper focus on the best interests of the child

90. The Extradition Act can and should be read consistently with New Zealand's

[126] As it did at [63] to rebut a concern about impact on whānau and [redacted] leading his life in accordance with tikanga.

[127] It is noteworthy that early UK extradition legislation assumed that all individuals subject to extradition were fugitives: see the Fugitive Offenders Act 1881 (UK). Over time, including with the development of human rights instruments and legislation, there has come to be a recognition that some individuals will be wrongly or unfairly sought for extradition, and that a distinction needs to be drawn between fugitives and non-fugitives.

obligations under the United Nations Convention on the Rights of the Child.[128] Contrary to at least one previous statement in New Zealand case law,[129] extradition of a parent to a child (especially a young child) is an action "concerning children" that triggers the requirement under the United Nations Convention on the Rights of the Child for a child's best interests to be a primary consideration.[130] Also salient is the Convention guarantee of a child's right to know and be cared for by their parents,[131] and the right for a child not to be separated from their parents against their will except under particular circumstances.[132]

91. Ensuring that [redacted]s child's best interests were a primary consideration in determining whether a discretionary restriction to surrender applied under s 8 did not require the child's best interests to be the overriding or determining consideration. What it did require was for the Court of Appeal to undertake a proper, genuine, and realistic analysis of the child's best interests.[133] This ought to have involved the Court considering how the child's interests would be served or undermined by extradition. Specifically, this would entail considering the evidence of the different kinds of support offered by [redacted] to his partner and household, and assessing the impact of extradition on these supports and the interests of the child. It could also include considering any other interests of the child (including in whanaungatanga, as discussed further below) affected by extradition. Of particular relevance in this case is the uncontested evidence: (i) that [redacted] provides physical, emotional, and financial support to his partner, which would assist the raising of the child; (ii) that [redacted]own emotional and physical support for the child is significant for raising the child; and (iii) that the absence of [redacted]and his emotional, physical, and financial support will conversely be contrary to the child's interests.

92. A proper, genuine, and realistic analysis of the child's best interests could only

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[128] See *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Tipping J for the majority.

[129] *Radhi v District Court (Manukau)* [2017] NZCA 157 at [42].

[130] A decision to extradite where a child is affected is a decision that directly or indirectly affects children. General Comment No 14 of the United Nations Committee on the Rights of the Children states that the legal duty to ensure a child has his or her or their best interests taken as a primary consideration "applies to all decisions and actions that *directly or indirectly affect children*": see United Nations Committee on the Rights of the Children, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, CRC/C/GC/14, 29 May 2014, at 4.

[131] Article 7(1).

[132] Article 9.

[133] See *Wan v Minister for Immigration* [2001] 107 FCR 133 at 140.

lead to the conclusion that the child's best interests would be in [redacted] remaining with the family rather than being extradited to Australia. No argument or evidence was given to the contrary. That conclusion adds significant weight to the position that extradition would be oppressive in this case. The Court of Appeal did not undertake such an analysis and did not grapple with the force of the argument concerning the best interests of [redacted]s child.

93. The Court of Appeal acknowledged that the importance of the family unit and best interests of the child are "embedded into the fabric of New Zealand law" and "relevant in this context".[134] The Court went on to say that separation of a parent from their child for a potentially significant period of time "is a factor to be carefully balanced against the public interest in extradition".[135] Having set out this approach, the Court did not return to what was in the best interests of the child. The Court simply said that comity and the seriousness of the offending "outweigh[ed]" factors earlier listed.[136] The Court did not unpack or elaborate on the best interests of the child in this case, or consider the way in which the absence of [redacted] emotional, physical, and financial support for his partner and household would hurt the child's interests. The Court simply identified the best interests of the child as a relevant factor. In so doing the Court fell into error.

94. The British case law reinforces the view that a more fulsome analysis of the best interests of the child is necessary to ensure they are a primary consideration, in accordance with international obligations. Lord Kerr, in interpreting the requirement of the best interests of the child being a primary consideration (in a non-extradition context), has said that the best interests of the child is not "a factor of limitless importance in the sense that it will prevail over all other considerations", but "[i]t is not merely one consideration that weighs in the balance alongside other competing factors".[137] His Lordship went on to say: "What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."[138] Lady Hale for the majority in that case also indicated similarly that

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[134] At [61] of the Court of Appeal judgment.
[135] Ibid, at [62].
[136] Ibid, at [65].
[137] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at [46]. Lord Kerr was giving a separate judgment.
[138] Ibid.

the best interests of the child should be considered first, to determine the level of force that any countervailing considerations would have to reach in order to displace the best interests of the child.[139] Put another way, a throwaway or cursory general reference to the best interests of the child is not sufficient to render them a primary consideration; those interests must be unpacked and elaborated in a particular case.

95. British cases on extradition and the best interests of the child confirm the need for such an approach. A "full investigation into a child's position" is required;[140] the outcome that would be in the best interests of the child should be expressly identified and should "weigh heavily";[141] all involved in an extradition case should "be alive to the need to have regard to the best interests of the child as a primary consideration".[142]

96. As recognised in the cases examined in *HH* on this point, the fact a child is very young (two children in one case were aged three and eight) will indicate that the effects of separation are likely to be "exceptionally severe".[143] Despite the different context before the United Kingdom Supreme Court in *HH*, Lady Hale did also clarify a number of general principles in extradition cases involving separation of a parent from young children which arguably count against surrender in [redacted] case. These included the principle that delay since crimes were alleged to have been committed can diminish the weight to be attached to the public interest in extradition and increase the impact on private life;[144] there is no test of exceptionality in such cases;[145] there is no obligation to return anyone in breach of fundamental rights;[146] and, it is not enough for a court to simply say that children's interests will always be harmed by separation from a parent.[147]

Whanaungatanga and cultural reconnection as a further key consideration

97. Finally, it is relevant to s 8(1)(c) to consider the central place whanaungatanga and cultural reconnection has come to play in [redacted] life and the family he has

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[139] Ibid, at [26].
[140] *PA v Criminal Court Coimbra (Portugal)* [2017] EWHC 331 (Admin) at [10] and [62].
[141] *Haczelski v Poland* [2024] EWHC 459 (Admin) at [25]–[28].
[142] *H v America* [2015] EWHC 1066 (Admin) at [47](iii).
[143] At [44]. On best interests of the child, see also *Wan v Minister of Immigration* [2001] 107 FCR 133.
[144] *HH*, above n 54, at [8].
[145] Ibid.
[146] At [31].
[147] At [34].

created. Whanaungatanga is relevant by virtue of both the Treaty of Waitangi and because of its cultural and social importance to Māori. It cannot be crudely dismissed on "safe haven" grounds, especially given this is not a fugitive case.

98. Whakapapa and whanaungatanga are central structural concepts in the Māori world. They are a source of rights, but also give rise to obligations. As the Law Commission recently recognised:[148]

> Whakapapa and whanaungatanga ensure that the order of things is properly understood and that connections to the natural world, place and people are acknowledged, maintained and nurtured. In these ways, whakapapa and whanaungatanga function as underlying structural norms within tikanga. We see this as their primary normative and jural significance. The connections understood and upheld through whakapapa and whanaungatanga establish the framework and basis for interests in Māori society, including powers, rights and duties.

99. In *Tukaki*,[149] Winkelmann J (as she then was) – noting that Te Tiriti o Waitangi could be relevant to statutory interpretation even without an express statutory reference[150] – took judicial notice of whanaungatanga as a value relevant to immediate whānau and connection to broader hapū and iwi.[151] In doing so Winkelmann J found that "the removal of a person from their culture, cultural practices and whānau can all be factors to be weighed under s 8".[152]

100. In *Tukaki*, there was no specific evidence of particular relationships, responsibilities, or hardships relevant to cultural practices that would flow from extradition. Here there is specific evidence of a nexus between the delay and the laying down of roots. The evidence of [redacted] is that the passage of time allowed a focus on "whānau" (in a specific and broader sense) and "activities that help with … wairua".[153] The reference to "wairua" is a reference to spiritual wellbeing flowing from [redacted]s reconnection. [redacted] is now "involved in the … local marae" (evidencing the real and ongoing connection he has developed with the affairs of his marae and, by extension, his hapū and iwi communities). As part of this connection [redacted] discharged responsibilities to help care for kaumātua during the Covid-19 pandemic.[154] [redacted] says he has

[148] See *He Poutama* (NZLC SP24), at 3.48.
[149] See n 55 above.
[150] Ibid, at [36].
[151] At [28].
[152] At [40].
[153] Court of Appeal judgment at [23].
[154] At [24].

"managed to get" his "life back on track", overcoming difficulties with alcohol.[155] Cultural reconnection and the creation of a stable family base within those cultural confines has clearly contributed significantly to this.

101. The affidavit [redacted] mother notes [redacted] volunteering at the Whakatō marae, through monthly lawn and grounds maintenance, as well as involvement with manuhiri (visitors) and support at the marae when gatherings are held.[156] Again, this evidences the real and ongoing connection [redacted] has developed. [redacted] mother also observed the gratitude of kaumātua following [redacted] support in providing firewood to them during the COVID-19 pandemic.[157]

102. There is a clear nexus between the passage of time and [redacted] cultural reconnection. Delay enabled [redacted] o build strong cultural relationships, at his marae (where he plays an ongoing role) and within his wider iwi and hapū community.

103. Whakapapa and whanaungatanga have therefore impacted [redacted] personal circumstances in two specific ways. First, his reconnection with his iwi has deepened the roots he has laid down for his young family. [redacted] did not just return to New Zealand and start a family; he went back to his ancestral home and is now raising his son within his marae, hapū and iwi communities. Secondly, it has been the key to [redacted] own healing, coming of age and journey as a Māori man. Put simply, whānau has become everything for [redacted] and has enabled him to not only rebuild his life, but create a new life for his young family connected to his Māori heritage.

104. There is overlap here with consideration of the best interests of [redacted] child. Given the importance of whanaungatanga to all Māori, it is plainly in the best interests of [redacted] Māori child to maintain the strongest possible whānau connection. This reinforces the view that it is in the best interests of [redacted] s child for [redacted] not to be surrendered.

105. However, whakapapa and whanaungatanga provide a standalone ground that justifies declining surrender. It is noteworthy the importance of the family unit in a non-tikanga context has been previously affirmed by this Court.[158]

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[155] At [28].
[156] At [11].
[157] At [14].
[158] See *Helu v Immigration Protection and Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at Elias CJ per [76]; at [171] per McGrath J; and [210] per Glazebrook J.

The Court of Appeal made no reference to the importance of whakapapa and whanaungatanga. In doing so, the Court erred in dismissing cultural reconnection as part of "the inevitable and inherent consequences" of extradition when s 8(1)(c) makes clear that matters hooked to delay can be considered, and cultural reconnection is clearly hooked. The severing of the cultural reconnection for [redacted] is plainly a further factor to be weighed in assessing whether it would now be oppressive to surrender him.

Postscript: correspondence between Crown Law and the Director of Public Prosecutions for Western Australia

106. Just under a fortnight before these submissions were due, the respondent shared with the appellant a letter sent by Robert Owen SC, the Director of Public Prosecutions for Western Australia. Mr Owen answered questions posed by the Court of Appeal. The letter indicated that the Western Australia Office of the Director of Public Prosecutions was still ready to prosecute [redacted]. The letter anticipated that a trial would not occur until at least late 2026 or early 2027. It noted that "it would be a rare, if not novel, occurrence" for [redacted] to be bailed to reside in New Zealand; this would be a matter for the presiding judicial officer.

107. This confirms that it is very unlikely [redacted] will be bailed back to New Zealand while awaiting trial. It also places a question mark over the possibility of bail altogether given it would require a suitable address within Western Australia. It is therefore open for this Court to conclude, as the Court of Appeal did in *Curtis v Commonwealth of Australia*, that "the very act of extradition, which involves taking [the appellant] away from his home, family and partner to what is likely to be imprisonment on remand in Australia, is a most significant hardship on its own, even if there will ultimately be a stay."[159]

Drawing the threads together – a constellation of factors that point to the conclusion that surrender would be oppressive in this case

108. This case involves a request from the Commonwealth to extradite a young Māori man following a period of delay that was inexcusably dilatory. He is not a fugitive, evading authorities and fleeing from prosecution. Rather, he re-entered Australia on multiple occasions, with no intervention from authorities, which engendered what we now know to be a false sense of

[159] *Curtis v Commonwealth of Australia*, above at n 30, at [109]; see also [120].

security. While the alleged offending is moderately serious, the sheer period of the delay, and culpability for its length sitting solely with the Commonwealth, reduce the public interest to be attached to extradition in [redacted] case; and considerations of 'safe havens' have no place in this case.

109. During the period of the delay [redacted] turned his life around, reconnected with his marae, hapū and iwi communities, and became an active and valuable member of those communities. He also started a family and welcomed the birth of his first child who he is raising within those marae, hapū and iwi communities. This case is unusual due to the significance of the change in personal circumstances, which include deep reconnection to his home and culture – the direct result of the delay by the Commonwealth. This case engages with what was said in *Tukaki* because here there is real and unchallenged evidence of reconnection by [redacted] with his whakapapa. To extradite him in these circumstances would be oppressive and warrants the exercise by the Court of its discretion to decline extradition under section 8.

110. The Court of Appeal fell into error in this case, which it acknowledged was finely balanced. It did so by double-counting comity. It also failed to grapple with [redacted] status as a non-fugitive; the best interests of [redacted] child; and cultural reconnection considerations made relevant by the Treaty of Waitangi, and the application of Māori whanaungatanga and whakapapa principles.

111. The appeal should be allowed.

Dated at Gisborne this 5th day of September 2025

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Tiana Epati / Max Harris
Counsel for the Appellant

I, Tiana Epati, can confirm that to counsel's knowledge there is no suppressed or confidential information contained in the submissions.